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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHNNIE WALKER, aka PJ's Auto Body,

Petitioner,

v.

GEICO GENERAL INSURANCE COMPANY; GEICO CASUALTY COMPANY; GEICO INDEMNITY CO.; and USAA CASUALTY INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals abrogate California law when it held that California does not recognize an equitable claim styled as unjust enrichment that seeks restitution as its remedy?

2. Should the Court of Appeals have foreclosed Walker's ability to seek an injunction to prevent harm pursuant to California Business & Professions Code § 17203 when he could not allege that he gave money to Respondents?

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OPINION BELOW

On March 10, 2009, the United States Court of Appeals for the Ninth Circuit rendered its published opinion in *Walker v. Geico General Insurance Company et al.*, 558 F.3d 1025 (9th Cir. 2009) (App. A). The Memorandum and Order of the United States District Court for the Eastern District of California is dated February 12, 2007 (App. B). On May 4, 2009, the United States Court of Appeals for the Ninth Circuit issued its Order denying Walker's timely Petition for Rehearing (App. C).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

Every state in the Union, including California, recognizes an equitable cause of action styled as "unjust enrichment." The Ninth Circuit does not. This case presents the unusual situation where a federal court sitting in diversity has nullified the law of California's highest court, which, in turn, has created a dangerous precedent that is now being followed by several California state and federal courts. This Petition seeks to correct the anomalous decision below to prevent further perversion of the common law.

In addition, this Petition presents a related question under California's Unfair Competition Law, California Business and Professions Code §§ 17200 *et seq* ("UCL").

The Ninth Circuit determined that Walker did not have standing to seek injunctive relief under the UCL because he could not allege that he turned over money to Respondents that is capable of being returned through an award of restitution, as that term has been specifically defined in the UCL context. As more fully explained below, if someone like Walker were required to show that they lost money *as a prerequisite* to seeking injunctive relief, then an entire class of litigants who seek to *prevent* harmful conduct from occurring would be left with no remedy. The Ninth Circuit failed to recognize this critical distinction and thereby emasculated the most powerful remedy under the UCL: an injunction.

Both issues presented in this Petition are currently under review by the Second District Court of Appeal for the State of California in the fully-briefed case of *Webster v. Allstate Insurance Company* (Case No. B211390). It is anticipated that the Second District Court of Appeal will provide clarification on both issues which, if determined in Walker's favor, will allow this Court to simply remand with direction.

Petitioner Johnnie Walker operates an independent auto body repair shop called PJ's Auto Body in Northern California. Walker filed this class action on behalf of himself and a putative class of independent auto body repair shops operating throughout the State of California.

Under California law, an insured is entitled to have his or her automobile repaired at his or her own choice of repair shops. Only if the customer asks the insurer

for a recommendation can the insurer then suggest a specific shop, but even then, the insurer cannot require the insured to use the recommended shop.

Per the California Code of Regulations, insurers are permitted to use the "prevailing auto body rate" of a particular geographic region as the maximum hourly rate that they have to pay for their insureds' vehicles to be repaired. But, in order for an insurer to use a "prevailing auto body rate" to settle (i.e., reduce) the amount paid for labor charges, they must first conduct a labor rate survey to determine the price charged by repair shops in a particular geographic area.

California Code of Regulations, Title 10, § 2698.91(a) defines a "survey" as:

> [A]ny gathering of information from auto body repair shops regarding what auto body repair labor rate the repair shops charge to determine and set a specified prevailing auto body repair rate in a specific geographic area.

California Code of Regulations, Title 10, § 2698.91(b) defines "prevailing auto body rate" as:

> [T]he rate determined and set by an insurer as a result of conducting an auto body labor rate survey of auto body repair shops in a particular geographic area and used by the insurer as a basis for determining the cost to settle automobile collision, physical damage, and liability claims for auto body repairs.

Insurers who decide to conduct such a survey are required to report the survey's results (including the names and addresses of the auto body shops and total number of shops surveyed) to the California Department of Insurance.

Rather than gathering the actual labor rates charged by Walker and the putative class, as required by the California Code of Regulations, Walker alleged that Respondents use lower-than-average labor rates for its surveys that have been negotiated with certain auto body repair shops that the insurance companies have contracted with in exchange for volume work. These high-volume, low-rate shops are called Direct Repair Providers or DRPs. The insurance companies utilize the lower-than-average rates from "fly-by-night" body shops. These types of body shops have lower rates because they are subject to minimal regulatory oversight due to their locale. Both of these methods skew the surveys and results in an artificially low "prevailing auto body rate." Instead of conducting a statistically-proper survey, the insurance companies pick and choose low rates for the surveys that they know will drive down the "prevailing auto body rate" and, thus, the amount paid to Walker and the putative class.

Walker alleged that Respondents' conduct constitutes an unfair business practice under California law first and foremost because it includes negotiated labor rates in its surveys that are lower than the regular hourly rate actually charged by the shops listed in the survey. The harm occurs when the insurance companies use the "prevailing auto body rate" to place a cap on the amount that insurance companies have to pay to

non-DRP shops, like Walker's, for labor charges. The problem is compounded by the fact that this "capping" typically occurs *after* the insured has chosen to bring their car to a non-DRP shop, has an estimate prepared, and the work has begun. Only after that occurs do Respondents rely on their false, and sometimes unreported, survey to claim that the shop's rate is unreasonable.

Left in the middle of all of this is the insured. The insured is unaware that the "prevailing auto body rate" determined by his or her insurer is artificially low, so the insureds are led to believe that their shop is "price-gouging" them on the rate being charged. In doing so, auto body repair shops, including Walker's, are faced with a dilemma if they want to keep the work: either force the insured to pay the difference between Respondents' false "prevailing auto body rate" and the shop's higher (but legitimate) labor rate, or accept an artificially low labor rate out of fear of losing the job and potential future business with the customer.

If the auto body shop does chose the former route, insureds are vulnerable to being indirectly "steered" to the DRPs to avoid being placed in the middle of the dilemma described above. California Insurance Code Section 758.5 explicitly prohibits "steering," i.e., the practice of an insurer improperly influencing its insureds to have their cars repaired at an auto body shop with which the insurer has a preexisting relationship.

Most often, the non-DRP shops choose to keep the business and lose money on the work. This is because Respondents' manufactured and fraudulent surveys

carry great weight due to the disparate bargaining power Respondents wield vis-à-vis small businesses like Walker. As a result, Respondents are successful in indirectly controlling where auto repairs are conducted and driving labor rates to sink to an amount lower than that which the market would actually bear. Respondents obtain the distinct benefit of paying below market rates for the vehicle repairs of their insureds, while at the same time, causing substantial financial harm upon California's independent auto body shops.

Unfortunately, this activity is not a new or infrequent phenomenon, and, as a result, has been addressed and specifically admonished by the California Department of Insurance. Despite being directly admonished, Respondents continue to manipulate labor rates for auto body repair.

Beyond the financial impact to Walker and the putative class, insureds in California are unknowingly also being affected. In those instances where the insured is asked to pay the difference between the auto repair shop's rate and the "prevailing auto body rate," and the insured cannot or does not want to pay the difference, the insureds are indirectly being forced to take their cars to DRPs which are not necessarily going to provide the quality work of the shop of their choosing. This occurs even though the insureds are supposed to have a true choice as to where they want to have their car repaired pursuant to The California Auto Body Repair Consumer Bill of Rights found in California Code of Regulations, Title 10, § 2695.85. Instead, for financial reasons, the insureds lose a meaningful choice and essentially are forced to take their car to a repair shop that is most beneficial to the insurance company.

Against this backdrop, Walker alleged three causes of action, only two of which are relevant to this Petition. One claim, labeled "unjust enrichment," seeks restitution to recover the difference between what Respondents' paid for auto body repairs, and what they should have paid had the surveys not been unfairly skewed. The other claim was grounded in California's UCL and sought preventative injunctive relief and the narrow type of restitution permitted under the UCL, namely the return of money. The District Court granted Respondents' 12(b)(6) motion to dismiss Walker's original complaint and denied him leave to amend (App. 18a).

In connection with his unjust enrichment claim, Walker alleged that Respondents were unjustly enriched as a result of manipulating the surveys which caused them to pay a lower hourly rate for auto body repairs. In dismissing, the District Court pegged its reasoning on a single sentence lifted from the California appellate decision in *Melchior v. New Line Prods., Inc.*, 131 Cal.Rptr.2d 347, 357, 106 Cal.App.4th 779, 793 (Cal. Ct. App. 2003) ("There is *no cause of action* in California for unjust enrichment") (App. 15a). One read of *Melchior* and it will be sufficiently clear that the *Melchior* court came to an improper deduction from the cases it relied upon. Even worse, *Melchior* impliedly repudiates the California Supreme Court decision in *Ghirardo v. Antonioli*, 924 P.2d 996, 14 Cal.4th 39 (Cal. 1996), which unequivocally upheld *a stand-alone claim* for unjust enrichment. *Ghirardo* was subsequently cited with approval and followed by *Hirsch v. Bank of America*, 132 Cal.Rptr.2d 220, 229, 107 Cal.App.4th 708, 721-722 (Cal. Ct. App. 2003), which was decided a month after *Melchior*.

Rather than observing the landscape of California law and following precedent, the District Court and Ninth Circuit picked one anomalous appellate case to support their erroneous conclusion. Although the Ninth Circuit recognized that contrary authority exists, it nonetheless summarily disregarded those cases and did not allow Walker leave to amend (App. 15a-16a). The Ninth Circuit completely dodged *Ghirardo*, which upheld an unjust enrichment claim despite the plaintiff's inability to assert rights arising out of other laws. See *Ghirardo*, 924 P.2d at 1002-1004.

If the Court does not grant this Petition, federal and state courts will continue to rely on the decision below as a proper interpretation of California common law, which will have a devastating effect on the equitable claim for unjust enrichment in California.

In order to have standing to pursue a claim under the UCL a plaintiff must allege that he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. Walker argued that even if he cannot establish "lost money or property" for purposes of obtaining the special type of restitution permitted under the UCL (i.e., return of money given to defendant), he should be entitled to seek injunctive relief to prevent the harm alleged (App. 3a). This is because Walker did "lose money" by having to accept a lower rate for auto body repair work.

Although the Ninth Circuit acknowledged Walker's argument, it failed to understand the devastating effect its decision has on one's ability to seek injunctive relief

under the UCL to prevent future harm. One of the driving principles underlying California's UCL is to prevent harm before it occurs. Section 17203 authorizes courts to enjoin "[a]ny person who engages, has engaged, *or proposes to engage* in unfair competition." Cal. Bus. & Prof. § 17203 (emphasis added). The decision below unnecessarily restricts the UCL's remedies by making one (injunctive relief) contingent on another (restitution).

The Ninth Circuit's decision now requires anyone seeking to prevent harm under the UCL to first demonstrate that he or she lost money or property *that is capable of being returned to the plaintiff through restitution* before being entitled to seek injunctive relief to stop future harmful acts. In other words, one has to be in a position to receive restitution before they can prevent future harm. The California Supreme Court has flatly rejected making one of the UCL's remedies contingent on the other. *ABC Int'l Traders, Inc. v. Matsushita Electric Corp. of America*, 931 P.2d 290, 302-304, 14 Cal.4th 1247, 1268-1271 (Cal. 1997).

After the District Court's decision, two other California District Courts recognized the absurdity of the District Court's logic. The Northern and Central Districts of California held that standing to seek purely injunctive relief does *not* require the ability to demonstrate loss of money or property necessary to support an award of restitution. Instead, a showing of some form of lost income will suffice. See *G & C Auto Body, Inc v. GEICO Gen. Ins. Co.*, 2007 U.S. Dist. LEXIS 91327, 2007 WL 4350907 (N.D. Cal. Dec. 12, 2007 [Jenkins, J.]) and *White v. Trans Union, LLC*, 462

F.Supp.2d 1079 (C.D. Cal. 2006 [Carter, J.]). The decision below did not address either of these contrary holdings.

After the decision below was reached, one Northern District court specifically distinguished the holdings of the District Court and the Court of Appeals and followed the trend of cases recognizing the distinction urged by Walker herein. *Fulford v. Logitech, Inc.*, 2009 WL 1299088 (N.D. Cal.). Consequently, the law in the Ninth Circuit is all over the map. Some district courts are choosing to not follow the flawed decision below – and for good reason.

Walker respectfully asks this Court to clean up the mess left in the wake of the Court of Appeals' affirmance of the District Court's dismissal so that state and federal courts reach consistent results in the future.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with the California Supreme Court's Decision in *Ghirardo*.

A. The California Supreme Court has recognized a stand-alone cause of action for unjust enrichment based on equity principles

While California courts have not been entirely consistent with the terminology (i.e., unjust enrichment, restitution, quasi-contract, or quantum meruit), California and every other state recognizes an equitable cause of action whereby one who has been unjustly enriched is required to disgorge money improperly obtained.

Walker alleged such a claim, yet the District Court made the unbelievable decision to dismiss the cause of action. The Court of Appeals stated: "Because the defendants have no money or property that belongs to Walker, he has no stronger claim for the equitable claim for restitution than he has for unfair competition under California law." (App. 4a.) What the Ninth Circuit failed to understand, despite vigorous argument by Walker, was that restitution has been *narrowly defined* in the UCL context to be limited to a plaintiff that has turned over money to a defendant.[1] In other words, the court below was constricted by its rigid view that an equitable claim for restitution requires that someone actually hand over something that is capable of being returned. This belief is not supported in the law. Unlike a claim for restitution under the UCL, it is widely accepted that an equitable claim for unjust enrichment seeking restitution as a remedy involves not only the return of money given up, but also the disgorgement of money saved.

In *Ghirardo*, the California Supreme Court clearly stated that a plaintiff may be entitled to seek relief under traditional equitable principles of unjust enrichment. *Id.* at 1002. In expounding upon this, the *Ghirardo* court drew from the Restatement of Restitution and recognized that "[u]nder the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another." *Id.* at 1003 (citing Rest., Restitution, § 1, p. 12). A person is enriched if he or she receives a benefit at another's expense, and the term "benefit" has been

1. See discussion in Section II.B, *post*.

construed to mean any form of advantage. *Id.* Thus, *Ghirardo* did not narrowly define restitution to be only when one gives some money or property to another, "but also when one saves the other from expense or loss." *Id.*

That California recognizes this broad equitable doctrine is amplified by the fact that its reviewing courts have adopted pertinent portions of the Restatement of Restitution, including its "Underlying Principles." *See, e.g., Kossian v. American Nat. Ins. Co.*, 62 Cal.Rptr. 225, 227-228, 254 Cal.App.2d 647, 651 (Cal. Ct. App. 1967); *First Nationwide Savings v. Perry*, 15 Cal.Rptr.2d 173, 181, 11 Cal.App.4th 1657, 1670 (Cal. Ct. App. 1992). Indeed, these courts have noted that when the facts of a given case do not fall within a certain Restatement provision, its Underlying Principles may be invoked. *Kossian*, 62 Cal.Rptr. at 227-228.

Numerous California appellate courts have recognized a cause of action for unjust enrichment. *See, e.g., Lectrodryer v. SeoulBank*, 91 Cal.Rptr.2d 881, 883, 77 Cal.App.4th 723, 726 (Cal. Ct. App. 2000) (setting forth elements of claim for unjust enrichment); *Marina Tenants Assn. v. Deauville Marina Dev. Co.*, 226 Cal.Rptr. 321, 181 Cal.App.3d 122 (Cal. Ct. App. 1986) (discussing Restatement of Restitution); *Birman v. Loeb*, 75 Cal.Rptr.2d 294, 64 Cal.App.4th 502 (Cal. Ct. App. 1998) (recognizing but distinguishing *Ghirardo*); *Enterprise Leasing Corp. v. Shugart Corp.*, 282 Cal.Rptr. 620, 626, 231 Cal.App.3d 737, 748-49 (Cal. Ct. App. 1991) (recognizing claim); *Solano v. Vallego Redevelopment Agency*, 90 Cal.Rptr.2d 41, 75 Cal.App.4th 1264 (Cal. Ct. App. 1999) (applying

Ghirardo and Restatement); *Hirsch*, 132 Cal.Rptr.2d 220, 225-226 (reversing lower court's dismissal of plaintiff's unjust enrichment claim upon finding that appellants stated a valid cause of action for unjust enrichment, applying *Ghirardo* and Restatement).

Likewise, *Ghirardo* and the Restatement have been recognized and utilized by numerous federal district and appellate courts, including all four federal districts in the State of California and each of the courts below. *See, e.g.*, *ViChip Corp. v. Lee*, 438 F.Supp.2d 1087, 1097 (N.D. Cal. 2006); *Gonzales Communications, Inc. v. Titan Wireless, Inc.*, 2007 WL 1994057 at *2 (S.D. Cal.); *Westways World Travel v. AMR Corp.*, 182 F. Supp.2d 952, 964 (C.D. Cal. 2001); *MV Transp. Inc. v. Omne Staff Leasing, Inc.*, 378 F.Supp.2d 1200, 1207 (E.D. Cal. 2005); *In re Atkinson*, 14 Fed.Appx. 960, 962 (9th Cir. 2001); *Shum v. Intel Corp.*, 499 F.3d 1272 (Fed. Cir. 2007); *Villager Franchise Sys. v. Dhami, Dhami & Virk*, 2006 WL 224425 at *7 (E.D. Cal.) ("California law recognizes a cause of action for unjust enrichment," citing *Ghirardo*).

B. The Court of Appeal should not have blindly relied on the authority cited by the District Court

Despite recognizing ample authority from California state and federal courts to the contrary, the District Court was led astray by two California appellate decisions that held there is no cause of action for unjust enrichment: *Melchior v. New Line Productions* and *McKell v. Washington Mutual, Inc.*, 49 Cal.Rptr.3d 227, 254, 142 Cal.App.4th 1457, 1490 (Cal. Ct. App. 2006).

Regrettably, these cases have caused a great deal of confusion and an apparent conflict among California courts, even leading the courts below to issue opinions that contradict the decision of the California Supreme Court in *Ghirardo*. Specifically, the District Court primarily relied on *Melchoir*, citing to it for the proposition that a cause of action for unjust enrichment does not exist. The problem is that rather than applying Supreme Court precedent in *Ghirardo*, the *Melchoir* court relied on two decisions out of the First District, *Dinosaur Development., Inc. v. White*, 265 Cal.Rptr. 525, 527-528, 216 Cal.App.3d 1310, 1314-15 (Cal. Ct. App. 1989) and *Lauriedale Assocs., Ltd. v. Wilson*, 9 Cal.Rptr.2d 774, 7 Cal.App.4th 1439 (Cal. Ct. App. 1992), both of which predated *Ghirardo*.

In *Dinosaur Development*, the First District Court of Appeal did not emphatically hold that there is no cause of action for unjust enrichment, but instead it concluded that "unjust enrichment . . . is synonymous with restitution." The *Dinosaur Development* court reached this result not by deferring to California principles of law, but rather, to the musings of a legal commentator who conflated a circumstance giving rise to recovery with the recovery itself. The two are not the same: "unjust enrichment" focuses on the individual who received a benefit, whereas "restitution" focuses on the provider of the benefit. Moreover, the commentator ignored the temporal aspect of these two terms. An individual cannot make restitution unless he or she has first been unjustly enriched. This principle does not work in reverse. To make matters worse, the court in *Lauriedale Assocs.* also relied on the flawed analysis of *Dinosaur Development*. *See Lauriedale Assocs.*, 9

Cal.Rptr.2d at 780. *Lauriedale Assocs.*, however, did recognize that the plaintiffs were essentially seeking restitution. *Id.*

The bottom line is that *Melchior* appears to have unfairly synthesized *Dinosaur Development* and *Lauriedale Assocs.* causing it to deduce a holding that has no basis in California law. The fact that there is no discussion of *Ghirardo* in *Melchior* (and that other divisions in the Second District in California have reached contrary results) leads to only one conclusion: If *Melchior* foreclosed a cause of action for unjust enrichment that seeks restitution as its remedy, it was wrongly decided. For this very reason, the Court of Appeal should have relied upon California Supreme Court precedent, rather than a poorly-reasoned appellate decision.

C. The Court of Appeals should have focused on the substance of Walker's claim, not its label.

However one wishes to call it, every state in the Union recognizes a traditional equitable theory under which an aggrieved party may recover the value of a benefit that has been conferred on another in a manner that stings the conscience. California is no exception. As stated in *Cassinos v. Union Oil Co.*, 18 Cal.Rptr.2d 574, 14 Cal.App.4th 1770 (Cal. Ct. App. 1993):

> California recognizes that: "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its

> intervention." In the same spirit it is said . . ."Living as we do in a world of change, equitable remedies have necessarily and steadily been expanded to meet increasing complexities of such changing times, and no inflexible rule has been permitted to circumscribe the power of equity to do justice. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirement of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrong are constantly committed.'

Id. at 583 (internal cits. omitted).

These principles were recently affirmed by the Northern District of California in *Nordberg v. Trilegiant Corporation*, 445 F.Supp.2d 1082 (N.D. Cal. 2006), where the court discussed the muddy waters surrounding unjust enrichment claims, rejected trifling semantic distinctions, and went on to hold that the plaintiffs in that case could properly "assert a claim for restitution based on a theory of unjust enrichment." *Id.* at 1100.

Walker, like the plaintiffs in *Nordberg*, seeks restitution and a constructive trust for the benefit

conferred on Respondents under a theory of unjust enrichment. Based on the equitable principles set forth above in *Ghirardo* and the Restatement, it is clear that California law provides Walker with a means for his desired recovery. Irrespective of the label attached by Walker, the District Court and the Court of Appeals should have examined the factual allegations of the complaint, to determine whether they state a cause of action on any available legal theory. Both courts were quick to come to the conclusion that if the claim does not have the correct "label," it must fail.

The label of a claim is not determinative, and it is possible to obtain restitution under a claim styled as unjust enrichment under the circumstances presented by Walker. This Court should reverse the decision below and permit Walker to pursue his cause of action for unjust enrichment.

II. The Decision Below Improperly Makes One Remedy Under California's Unfair Competition Law Contingent Upon Another, Thereby Conflicting with California Supreme Court Authority

A. Background of the UCL

The purpose of California's UCL "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Kasky v. Nike, Inc.*, 45 P.3d 243, 249, 27 Cal.4th 939, 949 (Cal. 2002). The UCL's scope is broad, and defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice."

Cal. Bus. & Prof. Code § 17200. In drafting this statute, the California Legislature "intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 540, 20 Cal.4th 163, 181 (Cal. 1999). Section 17200 "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Id.* The California Legislature limited the UCL's broad scope, by arming it with only two remedies: injunctive relief and restitution. Damages are not available.

The UCL "previously authorized any person acting for the interests of itself, its members or the general public (former § 17204) to file a civil action for relief." *California for Disability Rights v. Mervyn's, LLC*, 138 P.3d 207, 209, 39 Cal.4th 223, 228 (Cal. 2006) (internal citations omitted). Standing to bring such an action under the UCL was not contingent upon on a showing of actual injury or damage. *Id.* This all changed when the People of California passed Proposition 64, which imposed an actual injury requirement on a plaintiff pursuing a claim under the UCL, thus eliminating the unaffected plaintiff. As "stated in the measure's preamble, the voters found and declared that the UCL's broad grant of standing had encouraged frivolous unfair competition lawsuits that clog our courts, cost taxpayers and threaten the survival of small business." *Id.* (internal citations omitted). In discussing the voter's dissatisfaction with the prior law, *Mervyn's* noted:

> The former law, the voters determined, had been misused by some private attorneys who

> file frivolous lawsuits as a means of generating attorney fees without creating a corresponding public benefit, file lawsuits where no client has been injured in fact, file lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant, and file lawsuits on behalf of the general public without accountability to the public and without adequate court supervision.

Id. (internal citations omitted). The court continued, "[t]he intent of California voters in enacting Proposition 64 was to limit such abuses by prohibiting private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact" and limiting actions on behalf of the general public to the California Attorney General. *Id.* (internal citations omitted). In discussing the manner in which Proposition 64 altered the UCL, *Mervyn's* explained:

> Proposition 64 accomplishes its goals in relatively few words. The measure amends section 17204, which prescribes who may sue to enforce the UCL, by deleting the language that had formerly authorized suits by any person 'acting for the interests of itself, its members or the general public,' and by replacing it with the phrase, 'who has suffered injury in fact and has lost money or property as a result of unfair competition.'

Id. at 210. The court continued, "[t]he measure also amends section 17203, which authorizes courts to enjoin

unfair competition, by adding the following words: 'Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of [s]ection 17204. . . ." *Id.*

Based on the passages cited above, to carry out the California Electorate's intent nothing more is needed than Article III-type injury and some type of lost money or property. The District Court, however, went down treacherous path of statutory construction which, at its conclusion, resulted in narrowing standing under the UCL even more than California's electorate had intended.

B. The decisions below improperly equated "lost money" with the ability to seek restitution instead of interpreting the plain and ordinary meaning

The plain meaning of the statute does not require a plaintiff to literally give money to a defendant in order to seek injunctive relief. Any form of lost money should suffice. Every California appellate decision that has interpreted the language added by Proposition 64 for purposes of determining standing *has done so in the context of a claim for restitution.* No California decision has squarely confronted the issue here: If a plaintiff is not capable of seeking restitution (as defined under the UCL), but would like injunctive relief to prevent harm, does he or she still have to show that he or she handed the defendant money that is capable of being returned?

Restitution has been specifically and narrowly defined in the context of the UCL. Before Proposition 64 was enacted in 2004, the California Supreme Court in *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 29 Cal.4th 1134 (Cal. 2003) placed a limit on the *type* of restitution plaintiff could recover by giving "lost money" a hyper-technical definition. In *Korea Supply*, the Court felt that because standing under the UCL did not require that the plaintiff suffer any injury, a limit on the type of restitution that could be awarded was needed. In an attempt to strike a balance between the broad standing and the limited types of relief available under the UCL, the *Korea Supply* court held that "lost money" meant money that had once been in the possession of the plaintiff and given to the defendant. *Id.* at 947-950. Since the passage of Proposition 64, courts – like the ones below – have improperly borrowed from the discussion regarding *remedies* in *Korea Supply* to impose a heightened *standing* requirement that is far beyond what is required under Article III of the Unites States Constitution.

Walker contends that the reason "lost money" was given the gloss that it now has is because the cases interpreting those words were all decided in the context of a plaintiff who was seeking restitution. Relying on *Korea Supply*, courts have defined the type of "lost money" that is required for a plaintiff to have standing to seek restitution under the UCL as money that was given up and is capable of being returned. In other words, the remedy *defines* the type of "lost money." On the other hand, Walker contends that a plaintiff seeking injunctive relief should only have to demonstrate *some type* of "lost money" in order to prevent harm.

The first indication that "lost money" should be accorded the ordinary meaning urged by Walker where injunctive relief is sought is from the California Supreme Court decision in *Fireside Bank v. Superior Court*, 155 P.3d 268, 40 Cal.4th 1069 (Cal. 2007), which indicated that a claim for injunctive relief under the UCL may be viable in the absence of a claim for restitution:

> Gonzalez has standing. She, like other members of the putative class, was subjected to the same alleged wrong: deprivation of a fair opportunity to redeem the financed vehicle, followed by an unlawful demand for payment. The record demonstrates Fireside Bank repossessed Gonzalez's vehicle and pursued a deficiency judgment against her. She thus has standing to seek a declaration that Fireside Bank is unlawfully asserting a debt against her, as well as an injunction against all further collection efforts. The record further shows Gonzalez (or someone on her behalf) made a postrepossession payment against the alleged deficiency; upon proof she made that payment, Gonzalez also has standing to seek restitution.

Id. at 282 (emph. added). Footnote 8 of the opinion further supports this distinction:

> We leave it for the trial court to determine whether, on remand, it may be appropriate or necessary to designate subclasses consisting of those subjected to demands who made payments and have restitution claims, and

> those who did not and thus have only injunctive and declaratory relief claims. Contrary to Fireside Bank's assertion, the fact the record does not (as yet) disclose in which general group Gonzalez falls does not render the trial court's conclusion that her claims are typical an abuse of discretion.

Id. at 282, n. 8 (emphasis added).

In light of the discussions in *Fireside Bank* and *Mervyn's*, there is an indication that a plaintiff seeking purely injunctive relief only has to satisfy Article III standing requirements and demonstrate some form of "lost money," whereas a plaintiff seeking restitution together with (or apart from) injunctive relief also has to demonstrate that the "lost money" is capable of being returned to the plaintiff.

In his Complaint, Walker alleged that he loses money when Respondents (citing their manufactured surveys) force him to accept a labor rate lower than the true "prevailing auto body rate" (App. 7a). Under a plain and commonsense meaning of "lost money," these allegations should suffice for purposes of standing to seek injunctive relief under the UCL. With a heavy hand, the District Court dismissed Walker's entire cause of action instead of limiting the claim to injunctive relief.

C. By requiring Walker to demonstrate that he can obtain restitution in order to seek purely injunctive relief, the decisions below improperly make one remedy under the UCL contingent on the other.

The Court of Appeals failed to recognize that its affirmance expressly contravenes the policy and holdings espoused by the California Supreme Court.

In *Fletcher v. Security Pacific National Bank*, 591 P.2d 51, 23 Cal.3d 443 (Cal. 1979), the California Supreme Court engaged in an extensive public policy analysis of the goals and purposes of the UCL – an analysis that has since been cited repeatedly by California reviewing courts over the past three decades. *See, e.g., Kraus v. Trinity Management Services, Inc.*, 999 P.2d 718, 724, 23 Cal.4th 116, 125 (Cal. 2000); *Bank of the West v. Superior Court*, 833 P.2d 545, 553, 2 Cal.4th 1254, 1267 (Cal. 1992). In *Fletcher*, the court stressed the importance of the protective and deterrent purposes of the UCL as follows:

> [I]nasmuch as protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society, we must effectuate the full *deterrent force* of the unfair trade statute. Indeed our concern with thwarting unfair trade practices has been such that we have consistently condemned not only those alleged unfair practices which have in fact deceived the victims, but also those which are *likely to deceive* them.

Fletcher 591 P.2d 51 at 57. (emph. added; internal cits. omitted). In effecting the protective and deterrent

purposes of the UCL, a court may broadly fashion appropriate relief in two ways: an injunction or restitution.

One of the principal remedies under the UCL is injunctive relief. *Colgan v. Leatherman Tool Group, Inc.*, 38 Cal.Rptr.3d 36, 64, 135 Cal.App.4th 663, 701 (Cal. Ct. App. 2006). Its purpose is to protect the public: a court can protect the public's right to be protected from fraud and deceit, and may enter injunctive relief on that basis alone. *People ex rel. Mosk v. National Research Co. of Calif.*, 20 Cal.Rptr. 516, 520-521, 201 Cal.App.2d 765, 771 (Cal. Ct. App. 1962). Moreover, the courts' power to enjoin conduct proscribed by section 17200 is broad: "[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited, since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." *Motors, Inc. v. Times Mirror Co.*, 162 Cal.Rptr. 543, 546, 102 Cal.App.3d 735, 740 (Cal. Ct. App. 1980).

Based on policy objectives set forth in *Fletcher*, a court may act *prospectively* to prevent harm before it has occurred. But, under the decision below, a court could never use an injunction to act prospectively to prevent harm from occurring until harm that is capable of being remedied by restitution occurs first. This is because restitution seeks to redress a harm that has already occurred, and to restore the plaintiff to the status quo ante. *Colgan*, 38 Cal.Rptr.3d 36 at 60-61.

The California Supreme Court in *ABC Int'l Traders, Inc. v. Matsushita Electric Corp. of America*, 931 P.2d 290, 14 Cal.4th 1247 (Cal. 1997), declared that the UCL's

remedies are not contingent upon one another. The only difference between this case and *ABC Int'l Traders* is that the roles of the remedies have been reversed. *ABC Int'l Traders* warned against courts limiting the powers granted by the Legislature in an "illogical, unfair and counterproductive manner." *Id.* at 304.

Section 17203 authorizes "injunctive relief to prevent [unfair competition], and/or restitution (*i.e.*, disgorgement) of money or property wrongfully obtained." *Id.* at 302-303 (emph. in original). The Court of Appeals improperly linked injunctive relief and restitution by making injunctive relief contingent upon a showing of an entitlement to the type of restitution recoverable in a UCL action. This contradicts the holding of *ABC Int'l Traders* and the plain language of Section 17203. The California Supreme Court determined that there was no need to "read a restriction on relief into the statute." If the decision below is not reversed, injunctive relief will (absurdly) be forever contingent upon the ability to show a right to restitution.

Based on the marked differences between these two remedies, it is readily apparent that the decision below does not make good practical sense. More importantly, if the decision were left to stand, it would affect a substantive change on the statute. A plaintiff will be required to demonstrate that he or she gave up money that is capable of being returned before he or she can seek a species of relief designed to prevent the harm suffered! If a plaintiff is henceforth required to show that he or she is entitled to seek an injunction only after first establishing that he or she is entitled to seek restitution, much of the preventative force of the UCL

will be eviscerated from the statute. Such a result clearly contravenes one of the paramount policy objectives of the UCL, and would improperly effect a substantive change on the remedial aspects of the statute. See *Mervyn's*, 138 P.3d at 212 ("the measure does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct . . . [n]or does the measure eliminate any right to recover.")

The Court of Appeals unnecessarily limited the ability to seek injunctive relief as a remedy. Not only does this view contradict the California Supreme Court's ruling in *Mervyn's*, there is no evidence whatsoever that the People of California intended this result when they passed Proposition 64. Simply put, nothing in Proposition 64 suggests the voter's intent to narrowly define the class of persons who may seek an injunction under the UCL, or limit the remedies available under the statute. And nothing in Proposition 64 suggests an intent to alter the substantive scope of the UCL. The District Court and Court of Appeals' strained construction of Section 17204 effectively turns the UCL on its head by rendering injunctive relief impossible to achieve unless money is also capable of being returned through restitution.

D. Walker's allegations establish standing to seek injunctive relief under the plain meaning of "lost money"

Proposition 64's goal of eliminating the unaffected plaintiff can be met without restricting the relief available. So long as the plaintiff is, in fact, a "person of

interest" who has suffered economic or property loss (in whatever form) as a consequence of an unfair business practice, the protective goals of Proposition 64 have been met. *See, e.g., G & C Auto Body*, 2007 WL 4350907, at *3-4; *White*, 462 F.Supp.2d 1079, 1083; *Fulford*, 2009 WL 1299088, at *1-2.

The phrase "lost money" should be construed in the same way as those words are commonly understood. This approach is supported by the common definition of loss found in *Hall v. Time, Inc.*, 70 Cal.Rptr.3d 466, 158 Cal.App.4th 847 (Cal. Ct. App. 2008): "To lose is 'to suffer deprivation of.' (Webster's 3d New Internat. Dict., supra, at p. 1338.) A loss is '[a]n undesirable outcome of a risk; the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way.' (Black's Law Dict., supra, at p. 963.)" *Id.* at 470.

The Court can interpret the "lost money or property" in the same way as *Hall*, namely, *any* lost money or property should be sufficient to confer standing under the plain meaning of the statute. However, if a plaintiff wants to seek an award of restitution under the UCL, he or she would have to demonstrate that the money he or she lost is capable of being returned through restitution. On the other hand, if a plaintiff is *only* seeking injunctive relief, allegations of generalized loss of money should suffice to confer standing. Of course, if a plaintiff seeks both restitution and injunctive relief under the UCL, but he or she can only demonstrate generalized loss, then he or she should still have standing to seek injunctive relief. This common sense interpretation effectuates the goals of Proposition 64 while preserving the underlying policy and protections of the UCL.

CONCLUSION

For the forgoing reasons, Petitioner respectfully urges this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 10, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15357

D.C. No.
CV-06-01703-MCE

JOHNNIE WALKER, aka PJ's Auto Body,

Plaintiff-Appellant,

v.

GEICO GENERAL INSURANCE COMPANY; GEICO CASUALTY COMPANY; and GEICO INDEMNITY CO.,

Defendant-Appellees.

No. 07-15424

D.C. No.
CV-06-01618-
MCE/DAD

JOHNNIE WALKER, aka PJ's Auto Body,

Plaintiff-Appellant,

v.

USAA CASUALTY INSURANCE COMPANY,

Defendant-Appellee.

Appendix A

Appeal from the United States District Court for the Eastern District of California, Morrison C. England, District Judge, Presiding

Argued and Submitted
February 11, 2009—San Francisco, California

Filed March 10, 2009

Before: Mary M. Schroeder, William C. Canby, Jr. and Michael Daly Hawkins, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge:

The plaintiff-appellant Johnnie Walker does business as PJ's Auto Body ("Walker"). He filed these putative class actions against two major insurance companies doing business in California: USAA Casualty Insurance Company ("USAA") and GEICO General Insurance Company, *et al.* Walker claimed violations of various California statutes in connection with volume discount agreements the insurers had with other automotive body repair shops ("direct repair providers"). Walker similarly challenged the inclusion of negotiated prices in price surveys that insurance companies are permitted to conduct pursuant to California law. *See* Cal.Code Regs. tit. 10, § 2698.91. The district court dismissed the actions for failure to state a claim on which relief could be granted, and we affirm.

Appendix A

All issues arise under California law. The district court's decision in Walker's suit against USAA is published at *Walker v. USAA Cas. Ins. Co.*, 474 F.Supp.2d 1168 (E.D.Cal.2007).

Walker first contends on appeal that the district court erred in ruling that he lacked standing under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.* As amended pursuant to the 2004 voter approval of Proposition 64, the UCL in § 17204 now requires a plaintiff to establish that it has "suffered injury in fact and has lost money or property." *See Californians for Disability Rights v. Mervyn's, LLC*, 138 P.3d 207, 209-10 (Cal. 2006). Walker's position is that, although he cannot establish the requisite "lost money or property" for purposes of monetary relief under the UCL, he is nevertheless entitled to an injunction effectively requiring these insurers in the future to pay higher rates for their insureds' auto body repairs. His argument is supported neither by the language of the amended statute nor its purpose. *See Buckland v. Threshold Enters. Ltd.*, 66 Cal. Rptr. 3d 543, 557 (Cal. Ct. App. 2007) ("Because remedies for individuals under the UCL are restricted to injunctive relief and restitution, the import of the requirement is to limit standing to individuals who suffer losses of money or property that are eligible for restitution."). The history and purpose of the law are outlined more fully in the district court's opinion, with which we agree. *See Walker*, 474 F. Supp. 2d at 1172.

Next, Walker maintains that the district judge erred in dismissing his cause of action for "unjust enrichment," and that the district court should have analyzed his complaint as one attempting to plead a cause of action for restitution. *See McBride v. Boughton*, 20 Cal. Rptr. 3d 115, 121-22 (Cal. Ct. App. 2004). Because the defendants have no money or property that belongs to Walker, he has no stronger claim for the equitable remedy of restitution than he has for unfair competition under California law. *See Buckland*, 66 Cal. Rptr. 3d at 557-58.

Finally, Walker contends he has adequately alleged a violation of California's Cartwright Act, Cal. Bus. & Prof. Code § 16720. He essentially claims that the defendants conspired with direct repair providers for the purpose of restraining trade by agreeing to provide the providers more business in exchange for negotiated rates. He further alleges the agreements wrongfully enabled the insurers to include these negotiated rates in surveys in order to set lower prices for auto body repairs than the prices Walker would like to charge. As the district court correctly pointed out, however, the discounts negotiated between the insurance companies and the direct repair providers reflect the proper functioning of the market to bring about lower prices to consumers. "[Walker's] desire to charge more than the market will bear does not transform [defendants'] lawful formation of service contracts into a forbidden conspiracy to destroy competition." *Walker*, 474 F. Supp. 2d at 1175.

AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED FEBRUARY 12, 2007

UNITED STATES DISTRICT COURT
E.D. CALIFORNIA

Johnnie WALKER d/b/a PJ's Auto Body,

Plaintiff,

v.

GEICO GENERAL INSURANCE COMPANY, a foreign Corporation, and Does 1-50,

Defendant.

No. 2:06-cv-1703-MCE-DAD.

Feb. 12, 2007.

MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., United States District Judge.

Through the present action, Plaintiff Johnnie Walker d/b/a PJ's Auto Body ("Plaintiff") alleges Defendant GEICO General Insurance Company ("Defendant") has engaged in unfair competition under California Business and Professions Code section 17200;

has been unjustly enriched by its unlawful conduct; and has violated California's Cartwright Act under Business and Professions Code section 16720.[1]

Plaintiff alleges that Defendant negotiated volume discounts for auto body repair work with certain repair shops and then demanded that Plaintiff accept similar compensation for similar work in negotiations between Defendant and Plaintiff.

Now before this Court is Defendant's Motion to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). For the reasons set forth below, GEICO's Motion to Dismiss is granted without leave to amend.

BACKGROUND

Plaintiff Johnnie Walker d/b/a PJ's Auto Body is in the business of auto body repair in North Highlands, California. Defendant GEICO General Insurance Company provides automobile insurance in California.

On an unspecified number of occasions, Defendant's insureds brought automobiles to Plaintiff to inquire about auto body repair. On an unspecified number of these occasions, Plaintiff prepared written estimates of charges he would expect to be paid if he were to repair the cars in question. Although Defendant's insureds

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1. This case is related to *Walker v. USAA Cas. Ins. Co.*, No. 2:06-cv-1618 (E.D. Cal. filed July 24, 2006).

signed these estimates, they were still free to choose another auto body shop to perform repairs on their cars.

Following execution of the estimates, Plaintiff and Defendant commenced negotiation over the prices listed therein. During these negotiations, Defendant insisted that it would not meet Plaintiff's initial demand for an unspecified hourly rate for his labor.

Defendant pointed to lower rates that it previously negotiated with other auto body shops while bargaining for a lower rate with Plaintiff. Some of the rates Defendant referred to were for repair to a single automobile, while others were for volume referrals.

Fearing that he could lose the work to a better priced competitor, Plaintiff agreed to do auto body work for less compensation than he initially demanded.

STANDARD

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). A complaint will not be dismissed for failure to state a claim " 'unless it appears beyond doubt that plaintiff can prove no set of facts in support of [his or] her claim that would entitle [him or] her to relief.' " *Yamaguchi v. Dep't of the Air Force*, 109 F.3d 1475, 1480 (9th Cir. 1997) (quoting *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996)).

If the court grants a motion to dismiss a complaint, it must then decide whether to grant leave to amend. The Court should "freely give[ ]" leave to amend when there is no "undue delay, bad faith[,] dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of . . . the amendment, [or] futility of the amendment. . . ." Fed.R.Civ.P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

ANALYSIS

1. Unfair Competition

California's UCL prohibits "unfair competition," which it defines in relevant part to "mean and include any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof.Code § 17200. An "unlawful" business practice under the UCL is a practice that violates any other law. *Cel-Tec Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999). An "unfair" business practice claim must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id. at 186-87.*

In support of its Motion to Dismiss, Defendant argues that Plaintiff's Complaint fails to allege any facts to support a finding that Defendant has engaged in any

unfair competition and that Plaintiff lacks standing to assert any claim under the UCL. Plaintiff contends that Defendant engaged in unlawful and unfair business practices when Defendant insisted it would not pay him his fully disclosed and agreed to price for auto body work. Plaintiff also asserts that he lost money as a result of Defendant's actions and thus has standing.

Defendant contends that its alleged actions are not unlawful or unfair and that Plaintiff lacks standing to maintain any claim under the UCL because Plaintiff lacked a vested interest in the money he allegedly lost. Because Plaintiff's lack of standing is dispositive the Court will consider that issue alone.

a. ***UCL Standing Requirement***

The UCL previously permitted "any person" whether injured or not to maintain a claim. *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223, 228, 46 Cal.Rptr.3d 57, 138 P.3d 207 (2006). In the November 2004 election, California voters approved Proposition 64, which imposed a standing requirement on UCL claims. *See* Cal. Bus. & Prof.Code §§ 17203, 17204; *Mervyn's*, 39 Cal.4th at 228-29, 46 Cal.Rptr.3d 57, 138 P.3d 207. Now, to maintain a claim under the UCL, Plaintiff must show that he has "suffered injury in fact and has lost money or property as a result of unfair competition." Cal. Bus. & Prof.Code § 17204.

Neither Plaintiff, Defendant, nor the Court has succeeded in locating a decision definitively interpreting

the term "lost money or property" in section 17204. Accordingly, the Court is left to determine what the People of California intended when they added the standing requirement to section 17204 by passing Proposition 64.

Before Proposition 64, as currently embodied in section 17204, added the requirement that a plaintiff suffer a "loss of money or property" to have standing, the question of what constituted "lost money or property" for purposes of the UCL had already been defined by California courts.

See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1149, 131 Cal.Rptr.2d 29, 63 P.3d 937 (Cal.2003); *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.4th 163, 177, 96 Cal.Rptr.2d 518, 999 P.2d 706 (2000). "Where the language of a statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms have been used in the precise and technical sense that had been placed upon them by the courts." *People v. Weidert*, 39 Cal.3d 836, 845-46, 218 Cal.Rptr. 57, 705 P.2d 380 (1985) (internal quotations omitted). This principle applies to legislation adopted through the initiative process. *Id.* Accordingly, the People are presumed to have intended that the "loss of money or property" they required for standing would be interpreted in accordance with the construction already given to the "lost money or property" required to seek restitution under section 17203.

Appendix B

Interpreting section 12704's standing requirement in accordance with the meaning already given to "lost money or property" for section 17203 purposes also avoids inconsistency within the UCL. The provisions introduced by an amendatory act should be read together with the provisions of the original section and are to be interpreted so they do not conflict. *Smith v. Bd. of Trustees,* 198 Cal. 301, 306, 245 P. 173 (Cal.1926); *Cal. Corr. Peace Officers Ass'n v. Dep't of Corr.,* 72 Cal.App.4th 1331, 1334, 85 Cal.Rptr.2d 797 (1999). Accordingly, the "lost money or property" that can be restored pursuant to section 17203 and the "loss of money or property" required by section 17204 should be consistently interpreted.

Consistent construction of the UCL's provisions will also avoid the anomalous situation where a plaintiff could suffer "loss of money or property" for section 17204 purposes but simultaneously not have "lost money or property" for section 17203 purposes.

Therefore, the Court finds that the "loss of money or property" required for UCL standing should be construed identically to the "lost money or property" California courts require for section 17203 purposes. To claim a loss of money or property for section 17203 purposes, a plaintiff must have either prior possession or a vested legal interest in the money or property lost. *Korea Supply,* 29 Cal.4th at 1149-50, 131 Cal.Rptr.2d 29, 63 P.3d 937. Accordingly, to have standing to assert any UCL claim, Plaintiff must show either prior possession or a vested legal interest in the money or property allegedly lost.

Appendix B

B. *Application of the UCL Standing Requirement*

Plaintiff does not allege that Defendant ever possessed any money or property that was formerly in Plaintiff's possession. Instead, in his Opposition to the Defendant's Motion to Dismiss, Plaintiff contends he has a vested legal interest in the money in question.[2]

Plaintiff contends he had a vested legal interest in receiving his full hourly demand because he prepared estimates indicating his demand and the Defendant's insureds signed those estimates. Plaintiff asserts that he was deprived of this interest because Defendant insisted it would not pay him his full demand and Plaintiff agreed to accept less compensation to perform the work.

Plaintiff cites *Korea Supply* and *Cortez* to support his contention that he gained a vested legal right to be paid his full demand because he prepared estimates reflecting that demand. Defendant correctly notes that Plaintiff's interest is unlike the vested interest in *Cortez* and is closely akin to the interest the court found insufficient in *Korea Supply*.

Plaintiff's interest is unlike that asserted in *Cortez*. In *Cortez*, the court found employees had a vested legal

2. Although the Court ordinarily will not look beyond the complaint in ruling on a motion to dismiss, the Court does so here because the Court grants Defendant's Motion without leave to amend and these new allegations could be included in a subsequent amended complaint.

interest in overtime earnings they were denied. *Cortez*, 23 Cal.4th at 177-78, 96 Cal.Rptr.2d 518, 999 P.2d 706. The court found a vested interest because a state statute provided that overtime wages were due and owing the moment an employee worked over eight hours in a day. *Id.* Unlike the plaintiffs in *Cortez*, Plaintiff lacks any statutory authority for the proposition that payment for auto body work not yet undertaken was owed the moment an estimate was executed. Moreover, in *Cortez*, the vested interest arose out of the plaintiffs' actual performance of work. Here, Plaintiff claims a vested interest arising out of his preparation of an estimate for proposed work. This is a far cry from the *Cortez* plaintiffs' statutory right to payment for work already done.

Plaintiff's interest is very similar to that asserted in *Korea Supply*. There, the Court found that the company had no vested interest in receiving a commission for work done in negotiations for the award of a government contract. *Korea Supply*, 29 Cal.4th at 1149, 131 Cal.Rptr.2d 29, 63 P.3d 937. The opposing bidder obtained the contract by unlawful means thus depriving Korea Supply Company of its commission. *Id.* The Court explained that an "expectancy" or contingent interest is not a "vested interest" for purposes of the UCL. *Id.* As a result, the Court held that Korea Supply's interest was not vested. *Id.* Like the plaintiff in *Korea Supply*, Plaintiff here claims an interest in money he never possessed on the ground that he had an expectation of being paid. As in *Korea Supply*, Plaintiff asserts a vested interest that was merely a contingent

interest at best. Plaintiff admits that negotiations over the work and the price to be paid for it were still ongoing and that Defendant's insureds could have chosen another shop to do the work even after the estimates were signed. Plaintiff's receipt of payment was thus contingent upon the negotiations with the Defendant, the binding selection of Plaintiff to do the work, and Plaintiff's subsequent performance. Accordingly, any interest Plaintiff may have as a result of preparing an estimate is not a vested interest for purposes of the UCL.

Because Plaintiff cannot show either prior possession or a vested legal interest, he has not "lost money or property as a result of unfair competition" as required by section 17204. Plaintiff, therefore, lacks standing to assert any claim under the UCL and the Court need not address the issue further.

Lastly, it is clear that the deficiencies of the Complaint cannot be cured by amendment because it is the very nature of the Plaintiff's asserted injury that renders him unable to maintain any claim under the UCL. Accordingly, Defendants' Motion to Dismiss is granted without leave to amend as to Plaintiff's claims under the UCL.

2. Unjust Enrichment

Plaintiff also asserts an independent cause of action for unjust enrichment. In response, the Defendant correctly contends that unjust enrichment is a merely a

synonym for the remedy of restitution and not a stand-alone cause of action.

"There is *no cause of action* in California for unjust enrichment." *Melchior v. New Line Prods., Inc.*, 106 Cal.App.4th 779, 794, 131 Cal.Rptr.2d 347 (2003) (emphasis added); *see also McKell v. Wash. Mut., Inc.*, 142 Cal.App.4th 1457, 1490, 49 Cal.Rptr.3d 227 (2006). Unjust enrichment is synonymous with the remedy of restitution. *Dinosaur Dev., Inc. v. White*, 216 Cal.App.3d 1310, 1314-15, 265 Cal.Rptr. 525 (1989). Although Plaintiff has cited apparently contrary authority where courts have used the term "claim for unjust enrichment," the Court is not persuaded. In each case cited the courts were faced with plaintiffs who were claiming unjust enrichment based on rights arising out of other law.

See, e.g., Lectrodryer v. SeoulBank, 77 Cal App.4th 723, 91 Cal.Rptr.2d 881 (2000) (unjust enrichment claim based upon wrongful dishonor of a credit letter); *Weststeyn Dairy 2 v. Eades Commodities Co.*, 280 F.Supp.2d 1044, 1075 (E.D.Cal.2003) (unjust enrichment claim based upon an alleged trust and contractual rights). Plaintiff has not alleged any such theory here and cannot seek restitution on the basis of unjust enrichment alone without any other legal basis because unjust enrichment is not a cause of action in and of itself.

Because California law does not recognize Plaintiff's claim for unjust enrichment, there are no facts Plaintiff could prove to support this claim. Therefore, it is clear

that the deficiencies of the "omplaint cannot be cured. Accordingly, Defendant's Motion to Dismiss is granted without leave to amend as to Plaintiff's unjust enrichment claim.

3. The Cartwright Act

California's Cartwright Act prohibits any trust, which is defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. Cal. Bus. & Prof.Code § 16720. In order to maintain a cause of action under the Cartwright Act, the following elements must be established: (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts. *Kolling v. Dow Jones & Co.*, 137 Cal.App.3d 709, 718, 187 Cal.Rptr. 797 (Cal.Ct.App.1982).

California courts routinely apply the Cartwright Act by reference to the jurisprudence under the Sherman Act. *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1268 (9th Cir.1983). Like section 1 of the Sherman Act, 15 U.S.C. § 1, a Cartwright Act claim must allege co-conspirators and a conspiracy. *See, e.g., T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 633 (9th Cir. 1987).

Defendant correctly points out that Plaintiff's Complaint failed to identify any alleged co-conspirators or a conspiracy for anticompetitive purposes. However, in his Opposition, Plaintiff clarified the conduct that he alleges constituted a price-fixing conspiracy: Defendant

and other auto body shoops agreed upon "contractually reduced rates used for volume referrals." (Pl.'s Opp'n 28:2-5, Oct. 20, 2006.)

Although Plaintiff has identified agreements between Defendant and other entities, those agreements are neither unlawful nor made for any anticompetitive purpose. This is not price-fixing: it is just buying and selling with an agreement on transaction prices. *See, e.g., Texaco, Inc. v. Dagher,* 547 U.S. 1, __, 126 S.Ct. 1276, 1280, 164 L.Ed.2d 1 (2006) ("[T]he pricing policy challenged here amounts to little more than price setting by a single entity . . . and not a pricing agreement between competing entities with respect to their competing products.") It is difficult to imagine that numerous independent auto body shops would conspire with Defendant for the purpose of depressing auto body rates paid to those same auto body shops.

Plaintiff's allegations reveal only a well-functioning market for auto body repair; Defendant, a willing buyer, and willing sellers negotiate a fair price for labor the Defendant's insureds need and the sellers want to perform. Plaintiff's desire to charge more than the market will bear does not transform Defendant's lawful formation of service contracts into a forbidden conspiracy to destroy competition.

Because Plaintiff can show neither co-conspirators nor a conspiracy he is unable to maintain a claim under the Cartwright Act. Lastly, it is clear that the deficiencies of the Complaint cannot be cured by amendment

because the Cartwright Act simply does not prohibit a buyer from negotiating a volume discount from a seller. Accordingly, Defendant's Motion to Dismiss is granted without leave to amend as to Plaintiff's claim under the Cartwright Act.

CONCLUSION

For the reasons set forth above, GEICO's Motion to Dismiss is granted without leave to amend.

IT IS SO ORDERED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 4, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15357

D.C. No. CV-06-01703-MCE
Eastern District of California,
Sacramento

JOHNNIE WALKER, aka PJ's Auto Body,

Plaintiff - Appellant,

v.

GEICO GENERAL INSURANCE COMPANY;
GEICO CASUALTY COMPANY
GEICO INDEMNITY CO.,

Defendant - Appellees.

Appendix C

No. 07-15424

D.C. No. CV-06-01618-
MCE/DAD
Eastern District of California,
Sacramento

JOHNNIE WALKER, Doing business as
PJ's Auto Body,

Plaintiff - Appellant,

v.

USAA CASUALTY INSURANCE COMPANY,

Defendant - Appellee.

ORDER

Before: SCHROEDER, CANBY and HAWKINS, Circuit Judges.

The petition for panel rehearing is DENIED. No further petitions for panel rehearing will be entertained.